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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 JEFFREY B. REIFMAN,  
4 *individually and on behalf of*  
5 *all others similarly situated,*  
6 *ET AL,*

Plaintiffs,

v.

18 CV 11365 (PGG)

7 CANARY CONNECT, INC.,

8 Defendant.

CONFERENCE

9 -----x

10 New York, N.Y.  
11 April 17, 2019  
12 11:06 a.m.

Before:

13 HON. PAUL G. GARDEPHE,

14 District Judge

15 APPEARANCES

16 WALSH PLLC

Attorneys for Plaintiffs

17 BY: BONNER C. WALSH

-AND-

18 FARUQI & FARUQI

19 BY: TIMOTHY J. PETER

20 HINSHAW & CULBERTSON

Attorneys for Defendant

21 BY: EDWARD K. LENCI

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(Case called)

THE DEPUTY CLERK: Is the plaintiff ready?

MR. PETER: Yes.

THE DEPUTY CLERK: Please state your appearance.

MR. PETER: Timothy Peter, on behalf of the  
plaintiffs.

MR. WALSH: Bonner Walsh, on behalf of the plaintiff.

THE DEPUTY CLERK: Defendant ready?

MR. LENCI: Defendant is ready.

THE DEPUTY CLERK: Please state your appearance, sir.

MR. LENCI: Edward Lenci of the law firm of Hinshaw &  
Culbertson in New York City.

I represent defendant Canary Connect, Inc.

THE COURT: All right. This is a case alleging  
deceptive business practices with respect to the marketing and  
sale of home security video recording products.

I have a few questions I want to ask.

How did consumers buy this product? Do they walk into  
a store and buy it? Do they buy it online? How did they buy  
it?

MR. PETER: Your Honor there are a few different ways.  
Some people bought it on the Canary website, and some people  
went to say like a Best Buy or an electronics store and bought  
it that way, I believe.

THE COURT: Okay.

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1           And if they bought it online -- I guess I should say  
2           for the record there's an issue about whether consumers  
3           accepted certain terms, including an arbitration provision.

4           So if they bought it online, in order to consummate  
5           that transaction, did they have to -- is it your position that  
6           they -- what's your position of whether they had to accept  
7           terms and conditions when they purchased the product?

8           MR. PETER: Based on the evidence that Canary has  
9           presented us in their letter, the alleged contract only happens  
10          when you're installing the application that you need to after  
11          the purchase has been completed, you received your camera in  
12          the mail. Then you go to the website to download a thing, you  
13          open up the application, it says please accept the terms, the  
14          privacy policy, the end user license.

15          THE COURT: By this time you've already paid your  
16          money.

17          MR. PETER: Correct, your Honor.

18          THE COURT: Your money is gone.

19          MR. PETER: Yes.

20          THE COURT: And after you paid your money, then they  
21          say, Well, if you want to install it, you've got other things  
22          you've got to agree to.

23          MR. PETER: Yes, your Honor.

24          THE COURT: All right.

25          Let me hear from defense counsel.

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1 Do you agree that was the process?

2 MR. LENCI: Well, I do agree that they bought it  
3 online, through a brick and mortar Apple store or through a  
4 store such as Best Buy. And once they opened the box and  
5 wanted to activate the system, they were required to accept the  
6 terms. There was a hyperlink to the terms and conditions right  
7 above the word "accept." And all of them did it. And all of  
8 them accepted the terms and conditions of the product and  
9 services, which included an extremely broad arbitration clause  
10 with a class action waiver.

11 THE COURT: So what if they didn't accept the terms  
12 and conditions? What if they said --

13 MR. LENCI: They'd have to return the product.

14 THE COURT: I'm sorry, they'd have to --

15 MR. LENCI: They'd have to return the product.

16 THE COURT: But then they get their money back, I  
17 guess, right?

18 MR. LENCI: I would suppose they would get their money  
19 back.

20 THE COURT: So the defendants want to make a motion to  
21 compel arbitration. What I would like to understand is, is  
22 there a dispute -- well, I guess there are a couple of  
23 questions. One is to the extent they -- well, I guess it  
24 doesn't matter whether they bought it at a brick and mortar  
25 store or not, because this issue about clicking on the "accept"

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1 button presumably would arise whether you bought it at a brick  
2 and mortar store or you bought it online.

3 Do the parties disagree about whether the "accept"  
4 button was always there? Is there a disagreement about that?  
5 Because it's a little unclear to me.

6 The plaintiffs complain that the defendants only used  
7 the most recent version of the "accept" button stuff,  
8 suggesting that, Well, maybe it wasn't always this way.

9 So I wanted to inquire, is there a dispute about  
10 whether the "accept" button was always there or not?

11 MR. PETER: I believe there is. We see what they've  
12 presented to your Honor. We understand that to be the current  
13 app. Actually, in one of the contracts they provided, it  
14 actually asks the question. I actually don't believe that the  
15 contract they provided is necessarily the one that anyone saw  
16 or clicked on because it asks: Did every new user have to  
17 explicitly opt in, i.e., click "accept," question mark, end  
18 paren.

19 THE COURT: And what's that from?

20 MR. PETER: This is from the terms and conditions that  
21 they presented to your Honor that they apparently -- the  
22 consumers agreed to; although I have questions whether that  
23 actually was it because of that parenthetical in the terms.

24 THE COURT: Do you want to say something?

25 MR. LENCI: I do.

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1           Your Honor, it's our position -- and I have a  
2       declaration that I could submit with the motion to compel --  
3       that the click-and-accept button was always there; and that the  
4       declaration establishes that these six -- five or six  
5       defendants clicked and accepted. And the screen said terms and  
6       conditions --

7           THE COURT: These plaintiffs, you mean, these five or  
8       six plaintiffs?

9           MR. LENCI: Excuse me?

10          THE COURT: You said defendants.

11          MR. LENCI: I'm sorry. I misspoke, your Honor. It's  
12       five or six plaintiffs. There's only one defendant here.

13          These five or six plaintiffs clicked and accepted,  
14       according to our records kept in the regular course of  
15       business. And, as I said, I have a declaration from the head  
16       of U.S. operations to establish that.

17          THE COURT: All right.

18          Are you going to want discovery on this?

19          MR. PETER: I think I'd like to take a look at that  
20       declaration, as I haven't seen it yet. But I think yes,  
21       because it's a summary judgment standard, your Honor, on a  
22       motion to compel arbitration.

23          THE COURT: All right.

24          And so you'll take a look at the declaration. But  
25       assuming you don't find it completely satisfying, what period

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1 of discovery do you think would be necessary?

2 MR. PETER: I think a modest period of discovery  
3 perhaps.

4 THE COURT: Thirty days?

5 MR. PETER: That works for me.

6 MR. LENCI: Your Honor, if I may.

7 The typical practice in this cases is to get right to  
8 the motion to compel, with all respect, and not to address  
9 discovery because discovery is supposed to be addressed in the  
10 arbitration.

11 THE COURT: No, but this would be -- this is not  
12 full-blown discovery; this is discovery about whether there was  
13 an agreement or not which turns on this "accept" button.

14 And I gather that your position is that the "accept"  
15 button is always there and you say you have a declaration that  
16 says that.

17 What I'm hearing from plaintiffs' counsel is they want  
18 an opportunity to test that. So the discovery would be about  
19 the issue as to whether the plaintiffs and the other  
20 purchasers, whether they did, in fact, accept throughout --  
21 what is the applicable time period here? How far back are we  
22 going? There's a million different state laws; I suppose they  
23 vary to some extent.

24 MR. PETER: I believe four years, your Honor.

25 THE COURT: Okay. So roughly four years.

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1           So the issue would be whether during that entire  
2 four-year period, whether the "accept" button was always part  
3 of it.

4           So it wouldn't be full-blown discovery; it would be  
5 discovery about whether this "accept" button feature was always  
6 there or not. It seems like a pretty discrete issue.

7           MR. LENCI: If I may, your Honor.

8           There at the time that these plaintiffs clicked and  
9 accepted, is that what you're -- just limited to these  
10 plaintiffs.

11           THE COURT: No, I assume that there's a statute of  
12 limitation that governs these deceptive trade practices,  
13 consumer deception statutes. As I said, there's many different  
14 state statutes that are alluded to, and I don't know whether  
15 they have different terms or not with respect to statute of  
16 limitations. They may well.

17           But my point is that I think it's wasteful for the  
18 parties to file briefing on the motion to compel arbitration  
19 and then have a factual issue emerge. And it seems quite  
20 likely a factual issue is going to emerge. I might as well get  
21 it out of the way at the front end.

22           It's going to be quick, 30 days. And then once that  
23 discovery is complete, you can go -- in fact, we can set a  
24 briefing schedule for the motion to compel now; but it would be  
25 with the understanding that the parties will do 30 days of



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1 discovery focused strictly on this issue of the "accept"  
2 button, whether it was always there or not.

3 MR. LENCI: I will give them the motion when I have a  
4 copy of it for them.

5 But, your Honor, if I may, with all respect, the  
6 arbitration provision that the plaintiffs agreed to makes the  
7 issue of validity of the agreement to arbitrate or the scope of  
8 the agreement to arbitrate arbitrable. And under the *Meyer*  
9 case, which is on all fours with this, that goes right to  
10 arbitration. And it's for the arbitrator to decide if the  
11 contract was valid or if the agreement to arbitrate was valid,  
12 of if the scope of it covers what's in the complaint. It's a  
13 very broad arbitration clause.

14 THE COURT: All right. Listen, if you're telling me  
15 you want to brief the issue about whether I should allow 30  
16 days of discovery, we could do that.

17 MR. LENCI: I'd prefer that, your Honor. Thank you.

18 THE COURT: All right.

19 So in a week's time you'll submit whatever you want on  
20 whether I should allow discovery or not.

21 And you'll respond in a week.

22 And then based on that, I'll decide whether there's  
23 going to be discovery or not. Okay?

24 MR. LENCI: Thank you, your Honor.

25 THE COURT: So today is the 17th. So that means that

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1 by the 24th, defense counsel will submit either a letter or  
2 memorandum, whatever he prefers, telling me why I should deny  
3 discovery at this point and proceed right to briefing on the  
4 motion to compel arbitration.

5 And then on May 1st, plaintiffs' counsel will submit  
6 opposition explaining why it is that I should grant discovery.

7 And then based on those submissions, I'll make a  
8 decision one way or the other.

9 MR. LENCI: Your Honor, my papers are due on the 24th,  
10 your Honor?

11 THE COURT: Yes.

12 MR. LENCI: And I go first?

13 THE COURT: Yes.

14 MR. PETER: Your Honor, perhaps to short-circuit this,  
15 if he's willing to not provide any credible evidence in support  
16 of his motion to compel arbitration, I can agree that we don't  
17 need to have it.

18 THE COURT: I'm sorry, I don't understand, sir.

19 MR. PETER: It's a summary judgment standard. So  
20 there needs to be -- he needs to put forth evidence in support  
21 of his position, since it's his motion. If he's willing to  
22 agree not to provide any evidence, then I'm willing to not  
23 require discovery. I don't see how he can meet his burden.

24 MR. LENCI: Your Honor, may I propose something?

25 THE COURT: Yes.

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1 MR. LENCI: I have the papers here to serve on my  
2 opponent.

3 THE COURT: Right.

4 MR. LENCI: I have a motion to compel and memorandum  
5 of law.

6 In opposition, they can explain, I think, why they  
7 think there's no evidence of the click and accept for each one  
8 of them. And I submit, your Honor, that it's all discussed  
9 here very thoroughly by Mr. Stohrer. And if at the end of the  
10 briefing your Honor thinks that they have a point, there should  
11 be discovery, maybe we can address it then.

12 But it's just so atypical to go into discovery when  
13 the arbitration clause requires that this should be sent to the  
14 arbitrators in the first place. And I've got that fully  
15 briefed in here, your Honor.

16 THE COURT: What do you say?

17 MR. PETER: I would prefer what your Honor had  
18 initially suggested, the seven days and seven days on this  
19 issue, just so we don't have to go back and forth and do  
20 supplemental briefing later on the motion to compel.

21 THE COURT: That's what I'm going to do.

22 So defense counsel will put in a letter seven days  
23 from today explaining why he believes that I should not allow  
24 discovery on the question of whether the putative class agreed,  
25 pursuant to the "accept" button, to arbitrate any disputes, and

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1 plaintiffs' counsel will respond a week later with their  
2 opposition.

3 MR. LENCI: Is there a page limit on that, your Honor?

4 THE COURT: No, no page limit. And, as I said, it can  
5 be a letter or it can be a brief, whatever the parties prefer.

6 MR. LENCI: We can include exhibits and the like, your  
7 Honor?

8 THE COURT: Yes. Anything that bears on this issue  
9 you think is relevant, absolutely.

10 MR. LENCI: Thank you.

11 MR. PETER: Your Honor, would you prefer that to be  
12 bundled per your standing order?

13 THE COURT: Don't care. You can do it whatever way  
14 you want. Because I'm not seeing it as a typical motion, so it  
15 doesn't have to be bundled. You can submit it when you're done  
16 with it.

17 MR. PETER: Thank you.

18 THE COURT: Okay? And we'll take it from there.

19 MR. LENCI: Thank you, your Honor.

20 THE COURT: All right. Thank you.

21 MR. PETER: Thank you, your Honor.

22 MR. WALSH: Thank you, your Honor.

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